No. 15-1327

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BELLAGIO, LLC,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND CROSS-APPLICATION FOR ENFORCEMENT OF THE DECISION AND ORDER IN CONSOLIDATED CASE NUMBERS 28-CA-106634 AND 28-CA-107374

PETITIONER'S FINAL REPLY BRIEF

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29 U.S.C. § 157:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of [29 U.S.C. § 158(a)(3)].

29 U.S.C. § 158:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title; …

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization…

GLOSSARY

"ALJ" or "Judge" means administrative law judge.

"ALJD" means Administrative Law Judge Decision.

"Bellman" refers to a hotel employee who helps patrons with their luggage while checking in or out.

"Charging Party" and "Garner" refer to Gabor "Bryan" Garner.

"Decision and Order" or the "Decision" means the National Labor Relations Board's August 20, 2015 Decision and Order in *Bellagio, LLC and Gabor Garner and Najia Zaidi*, Case Nos. 28-CA-106634 and 28-CA-107374, reported at 362 NLRB No. 175.

"NLRA" or the "Act" means the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*

"NLRB," the "Board" or "Respondent" means Respondent National Labor Relations Board.

References to Transcript Pages and Exhibits refer to the Hearing Transcript[1] and Exhibits entered into the record during the unfair labor practice hearing which took place on January 6, 7 and 8 2014. Transcript citations refer to the page and line number of the testimony. Respondent's Exhibits are referred to as "RX --" and General Counsel Exhibits are referred to as "GCX --."

[1] Petitioner will be submitting excerpts of the record containing the portions of the record cited in the Opening Brief, and will submit a brief with cites to the pages in that compendium at that time.

SUMMARY OF ARGUMENT

Bellagio is the preeminent hotel on the Las Vegas Strip. Its reputation and continued commercial viability depends in large part on its reputation for providing the highest level of customer service. Bryan Garner, the employee who contends his rights under the National Labor Relations Act were violated, violated a rule of conduct which is critical to maintaining this reputation. He solicited a tip and was rude to the guests after they declined his solicitation.

The Board's decision in this case impermissibly intrudes upon Bellagio's genuine need to investigate and address Garner's misconduct. In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 258-259 (1975), the Supreme Court affirmed the Board's conclusion that the Act required employers to grant employee requests for union representation because, in part, it was limited by the Board's pronouncement that the "exercise of the [*Weingarten*] right may not interfere with legitimate employer prerogatives." 420 U.S. at 258-259. To that end, the Board has recognized employers' authority to suspend employees who refuse to participate in workplace investigations and remove them from the workplace, even when those employees have based their refusal to participate on the unavailability of a *Weingarten* representative, for more than thirty years. *See Roadway Express*, 246 NLRB 1127, 1130 (1979).

Garner was not removed from the workplace because he exercised his rights under *Weingarten.* He was placed on suspension pending investigation because he elected not to participate in a workplace interview, and Bellagio desired to interview him in the presence of a steward before returning him to work. Establishing a presumptive violation of the Act whenever an employer places an employee who refused to participate in an investigatory interview on suspension pending investigation contravenes the Supreme Court's original holding in *Weingarten*, and the Board has not provided a reasoned rationale for breaking from its precedent.

Indeed, the Board's rationale is circular and establishes a perverse bright line. Appendix00006 at fn. 9. It eliminates an employer's ability to take action when an employee suspected of misconduct refuses to discuss the matter. Under the Board's rationale, once the employee elects not to proceed without a shop steward, the employer would not be permitted to take any action because placing that employee on suspension pending investigation would necessarily be the direct result of the employee's decision not to participate. This conflicts with *Weingarten*.

All of the unfair labor practices of which Bellagio has been accused flow from the Board's premise that Garner's request for a shop steward necessarily limits Bellagio's right to investigate workplace misconduct. Although this incident

involved a guest complaint as opposed to misconduct which is more serious, the Board's rationale would not change. The Court should decline to enforce such an interpretation of the Act, particularly when the basis for the Board's decision is its own conjecture about supposed "chilling effects," not facts.

A. The Board's Finding That Bellagio Violated Garner's *Weingarten* Rights Should Be Vacated.

There is no dispute that Wiedmeyer stopped asking Garner questions about the guest complaint once he requested a union representative. There is also no dispute that once Wiedmeyer determined that a steward was unavailable, and then confirmed that Garner did not wish to submit a statement without a steward, Wiedmeyer terminated the interview and placed Garner on suspension pending investigation.

The Board nonetheless contends that a violation of the Act occurred because Bellagio supposedly "pressed" Garner to fill out a statement after he requested union representation. Answering Brief at 18-20 (citing Appendix00002 at n.7, Appendix00092-00094, Appendix00294-00298 and Appendix00308). This argument has no merit.[2] It is not supported by substantial evidence.

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[2] The Board contends that Bellagio "does not appear to contest" that a request for a written statement constitutes questioning for purposes of *Weingarten.* That is inaccurate. As noted in Bellagio's Opening Brief, *Weingarten* applies to oral interrogation. *See* Op. Brief at 26-27; 32-33. The purpose of the representative is to assist the employee with understanding and responding to questions, not completing a written statement. *See J. Weingarten, Inc*., 420 U.S. at 258-259. A

The only transcript testimony cited by the Board, pages 115-117, does not support the Board's finding. It establishes only that Wiedmeyer asked Garner to confirm that he would not complete a statement about the matter without a shop steward. When Garner did so, given Wiedmeyer's already exhaustive search for a representative, Wiedmeyer informed Garner that he would place him on SPI "and we'll figure it out in HR." Appendix00094. In assessing this testimony along with all of the other testimony in the record, the ALJ did not conclude that Wiedmeyer "pressed" Garner for a statement or otherwise sought to continue the interview. *See* Appendix00008 (summarizing Garner's credited testimony); Opening Brief at 33-34. He found that Wiedmeyer asked Garner to complete a statement and that Garner refused on the ground that no steward was available. *Id.*

The exhibits cited by the General Counsel, Appendix00294-00298, are the same. They are statements from Wiedmeyer and another supervisor, Max Sanchez, and they too show only that Wiedmeyer terminated the meeting after Garner refused to fill out a statement. As Member Johnson explained in his dissent:

> My colleagues rely on contemporaneous written accounts by Wiedmeyer, Max Sanchez, and Garner to find that Wiedmeyer continued to press Garner for a statement

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representative could serve no purpose in that regard other than to improperly coach an employee as to what should or should not be said. The critical issue under *Weingarten* is whether the employer ceased questioning the employee about the matter. *See* Op. Brief at 26-27; 32-33. Bellagio satisfied this requirement.

> after Garner requested representation. But those accounts establish no such thing. Wiedmeyer's statement says: "I returned to inform [Garner] I could not locate his representation [sic] and he would have to. He again refused and refused to fill out a statement regarding the issue. I placed him on SPI so he could not return to work until the investigation had been completed. I explained the three possible outcomes of SPI, he signed, had no questions and left."
>
> As my colleagues observe, Sanchez' and Garner's statements establish that Wiedmeyer informed Garner that Garner would be suspended pending investigation if he continued to refuse either to locate a representative for himself or to fill out a statement, and that Wiedmeyer thereafter did, in fact, suspend Garner pending investigation. These consistent contemporaneous accounts establish that Garner refused, throughout the interview, either to locate a representative for himself or to fill out a statement; they do not establish that Wiedmeyer sought to continue the interview after Garner's request. Accordingly, I cannot conclude that the General Counsel has carried his burden of proof on this issue, especially in the light of the unambiguous testimony to the contrary from both Wiedmeyer and Garner. Because Wiedmeyer discontinued the interview when Garner requested representation, the Respondent did not violate Garner's Weingarten right.

Appendix00005.

Under established law, the General Counsel bears the burden of establishing each element of its contentions that Bellagio violated the Act. *See, e.g., KBM Electronics, Inc.*, 218 NLRB 1352, 1359 (1975). In this case, the critical element required to establish a *Weingarten* violation -- a command that Garner continue the interview without representation -- is absent from the record.

With respect to the testimony cited by the Board in its brief, Garner did not testify that he was "pressed" for a statement or that Wiedmeyer ordered him to complete a statement under threat of discipline, and the absence of such testimony has particular weight in light of the fact that Garner unequivocally conceded that Wiedmeyer stopped all questioning about the guest complaint after Garner requested a steward. It was appropriate for Wiedmeyer to confirm that Garner wished to forego the opportunity to submit a statement without representation because Garner's failure to provide an account of what occurred when he allegedly solicited the tip could have an impact on the disciplinary outcome.

In its brief, the Board goes to great lengths to remind the Court that its factual findings are entitled to deference, but that does not mean the Board can base violations of the Act on inconclusive testimony. If it wished to prove a violation, the General Counsel should have asked different questions or introduced different evidence, and the Board's transparent attempt to fill a critical gap in its proof with argumentative taglines -- its repeated assertion that Garner was "pressed" -- is not evidence which can satisfy the burden of proof. *See, e.g.*, *Jackson Hosp. Corp. v. NLRB*, 645 F.3d 1137, 1142 (D.C. Cir. 2011).

B. The Board's Conclusion That Bellagio Violated The Act When It Placed Garner On Suspension Pending Investigation Should Be Vacated.

The Board's finding that Bellagio committed an unfair labor practice when it placed Garner on suspension pending investigation should also be vacated. First,

Bellagio's placement of Garner on suspension pending investigation is not an adverse action under *Wright Line*, and therefore fails to establish a prima facie violation of the Act. Second, Bellagio had a legitimate, non-discriminatory reason for removing Garner from work while it completed its investigation, and it was privileged to do so under Board law.

1. The Board Failed To Establish That Garner Was Subjected To An Adverse Employment Action.

As argued in the Opening Brief, suspending Garner pending investigation is not an adverse action under *Wright Line*. *See, e.g., Promedica Health Systems Inc.*, 343 NLRB 1351, 1351-1352 (2004). In response, the Board has conceded that 1) Bellagio's placement of Garner on SPI did not constitute discipline under the collective bargaining agreement which governed the terms and conditions of Garner's employment; 2) the SPI was both paid and brief, lasting less than a day; and, 3) the SPI culminated in a verbal warning which the General Counsel conceded was legitimate. Opening Brief 34-40. The Board merely disputes the meaning this evidence, contending that because the SPI nevertheless creates the risk of a "chilling effect," the violation should be sustained. Answering Brief 25-27.

As with the alleged *Weingarten* violation, the Board cannot circumvent its burden of proof by concocting a new theory through which it can give the appearance of evidentiary weight to its speculation about a "chilling effect."

Jackson Hosp. Corp., 645 F.3d at 1142. Prevailing Board precedent provides that actions like Garner's SPI, which neither constitute formal progressive discipline, nor lay "a foundation for future disciplinary action against [the employee]," do not constitute an adverse action for purposes of establishing a violation of the Act.[3] *Promedica Health Systems Inc*., 343 NLRB at 1351-1352 (quoting *Trover Clinic*, 280 NLRB 6, 16 (1986)).

Promedica should control the outcome of this case given the undisputed facts regarding the SPI, and the Board impermissibly departed from these precedents in this case and provided no justification for having done so. *Conagra, Inc. v. NLRB*, 117 F.3d 1435, 1443 (D.C. Cir. 1997) (it is "axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent.") (citations omitted).

The precedent supports Bellagio, not the Board. *Northeast Iowa Tel. Co*., 346 NLRB 465, 475-476 (2006), Answering Brief at 23, involved a discharge and explained that in order for an adverse action to be cognizable under *Wright Line*, it must involve a material and lasting change to the terms and conditions of an individual's employment. Clearly, Garner's suspension pending investigation had

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[3] The Board contends that *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993) does not support Bellagio's position because Garner was suspended indefinitely. That is a mischaracterization of the facts. Garner was contacted the same day he was suspended and told when to return to work. Appendix00176-00177.

no impact on the terms and conditions of his employment. It lasted less than 24 hours. It is not considered disciplinary under the collective bargaining agreement which governs the terms and conditions of his employment. And, Garner was fully compensated. As Moore explained:

> SPI is a holding pattern. It stands for a suspension pending investigation, and it's when something has happened in the workplace where we either need to conduct an investigation or something has happened in the workplace. We need to have a resolution before we return the employee to work. It's a holding pattern. It's not discipline in and of itself. It's just a holding pattern.

Appendix00171.

The other cases cited by the Board in its brief in an attempt to expand the concept of an "adverse action" are similarly inapplicable. Answering Brief at 23-25. *Tasty Baking Co.*, 254 F.3d 114, 129-30 (D.C. Cir. 2011), involves a concrete change in terms and conditions: a retaliatory transfer to the night shift. Neither *Southwire Co. v. NLRB*, 820 F.2d 453, 464 (D.C. Cir. 1987), nor *Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 836 (7th Cir. 2005), concern adverse employment actions. Both cases involve allegedly unlawful rules promulgated during a union organizing drive. *New Orleans Cold Storage and Warehouse Co., v. NLRB*, 201 F.3d 592, 600 n.8 (5th Cir. 2000) involved both a transfer (as noted in the Board's brief) and more importantly, the employee's termination (which is omitted from the Board's brief).

Extendicare Homes, 348 NLRB 1062, n.4 (2006) involves a disciplinary warning issued for threatening a supervisor. *Am. Red Cross Missouri-Illinois Blood Servs. Region*, 347 NLRB 347, 350 (2006), involves a lengthy meeting where an individual who had just testified in a Board hearing and denied that she was performing certain tasks, was warned that that she was expected to perform certain work under the employee handbook and that if she did not, she would be subject to discipline. *Murtis Taylor Human Servs.*, 360 NLRB No. 66 (March 25, 2014), is completely inapposite because it involves an unlawfully motivated investigation into issues the employer knew to be false and meritless.

The Board contends that Bellagio's citation to cases involving supervisor status is inapposite because supervisor status must be construed narrowly to avoid excluding employees from the Act's coverage. Answering Brief at 29-30. This is an artificial distinction. It is true as a general proposition that statutory exclusions are construed narrowly, *see, e.g., Jochims v. NLRB*, 480 F.3d 1161, 1168 (D.C. Cir. 2007), but the Board's attempt to sweep those decisions away on that basis does not follow. The narrow construction of supervisor status and other exclusions concerns the quantum of proof required to establish exclusion. *See id.* It has absolutely nothing to do with whether certain actions might be deemed adverse or not, and given that the purpose of 2(11) of the Act is to determine whether an individual is a member of management or not, the Board's findings that actions

undertaken by such individuals do not materially affect terms and conditions of employment is highly relevant to the disposition of this case. It would be illogical to permit the Board to employ a more relaxed standard when it holds an employer liable for an alleged unfair labor practice than it does in other contexts.

The Board's criticism of Bellagio's citation to cases involving other employment statutes is similarly misplaced. Courts frequently compare federal non-discrimination laws when they are interpreting Title VII and the NLRA. *See, e.g., Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S. Ct. 2261, 2267, (1989) (observing that NLRA cases are often persuasive in construing Title VII cases). In sum, Bellagio's position is supported by Board precedent in every context, as well as Federal Courts' assessments of other employment discrimination statutes. The Board's circular justification for finding that the SPI is adverse is not sufficient to justify departing from this precedent nor is it supported by the facts.

2. Bellagio Had A Legitimate Reason For Suspending Garner Under *Wright Line.*

As made clear in the Opening Brief and Member Johnson's dissent, the Board's rationale in this case -- that the investigation had a chilling effect because it was illegal -- is utterly circular.[4] It assumes an illegal investigation occurred in

[4] The Board claims that the mere act of placing Garner on suspension pending investigation was adverse because it supposedly reinforced the perception that

order to establish that an illegal investigation is adverse, despite all of the record evidence which established that in Las Vegas, at the Bellagio, for employees represented by Garner's union, suspensions pending investigations are common place and have no impact whatsoever on an employee's employment.

This is not a case where Garner was accused of a trumped up conduct violation. The Board has conceded that Garner solicited a guest in a manner which warranted discipline. To find that placing him under investigation for such suspected misconduct is a per se adverse job action goes farther than the Act can bear. Such a conclusion is totally unreasonable and unworkable in a modern business environment. Indeed, as the Board recognized in a different case, placing an employee on suspension pending investigation is a common tool which permits employers to "quickly remov[e] an employee from the workplace, limit[] the employee's access to coworkers (consistent with its legal obligations) or equipment, or tak[e] other necessary actions to address exigent circumstances when they exist."[5] *Alan Ritchey*, 359 NLRB No. 40, slip op. at 9 (2012) (noting

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Bellagio could "quell protected activity at its source." Answering Brief at 25 (quoting Appendix00004 at n.13). That contention is speculation which assumes the underlying unlawfulness of the suspension, not actual evidence of adversity.

[5] In a footnote, the NLRB suggests that Petitioner's citation to *Alan Ritchey* is off the mark because *Alan Ritchey*'s holding arises in a different context and because it has been overruled. That footnote is misleading. Although *Alan Ritchey* concerns whether an employer is obligated to bargain with the union before making a change in the terms and conditions of an employee's employment, it is

that "In the circumstances described, an employer could suspend an employee pending investigation, as many employers already do."). By establishing a presumptive violation of the Act whenever an employer utilizes a suspension pending investigation after an employee refuses to proceed contravenes the Supreme Court's original holding in *Weingarten*, which provided that the "exercise of the [*Weingarten*] right may not interfere with legitimate employer prerogatives." 420 U.S. at 258-259.

Under *Weingarten*, Bellagio had the right to discontinue Garner's interview and then take whatever action it would normally take without the benefit of Garner's testimony. That is what happened here. Bellagio desired to continue its investigation and avoid returning Garner to work. From Wiedmeyer's perspective,

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nonetheless significant. It establishes that placement of an employee on suspension pending investigation does not have an immediate effect on the employee's status. 359 NLRB No. 40, slip op. at 9. To the extent the Board found that placement of an employee on suspension pending investigation was insufficiently material to require pre-imposition bargaining in the absence of a collective bargaining agreement, it follows that it is insufficient to establish an adverse action under the Act. If it were adverse, it would require bargaining just like other suspensions and discharges. That holding undermines the Board's rationale in this case. Bellagio agrees that *Alan Ritchey* is not binding, but the Board continues to look to its principles. *Alan Ritchey* was not overruled on the merits. It was rendered nugatory by the Supreme Court's decision in *Noel Canning*, which found that the NRLB lacked authority to issue decisions during the period of time it did not have a quorum. In fact, the NLRB's General Counsel continues to take the position that *Alan Ritchey* is good law. *See, e.g., Linwood Care Ctr.*, 2016 NLRB LEXIS 259 (Apr. 5, 2016) (noting the General Counsel's reliance on *Alan Ritchey*); *Kitsap Tenant Support Services, Inc.*, (JD(SF)-29-15, 2015 NLRB LEXIS 560) (unpublished Board decision relying on *Alan Ritchey*).

Garner was not capable of returning to the floor and providing five diamond customer service. Neither the ALJ nor the Board has ever found that Wiedmeyer's reasons were not "honestly invoked" or that they were pretextual. *Healthcare Employees Union, Local 399 v. NLRB*, 463 F.3d 909, 921-22 (9th Cir. 2009) (quotations omitted).

Garner was not removed from the workplace because he exercised his rights under *Weingarten*. He was placed on suspension pending investigation because he elected not to participate in a workplace interview, and Bellagio desired to interview him in the presence of a steward before returning him to work. Under the Board's decision *Roadway Express*, 246 NLRB at 1145, which affirmed the suspension (not suspension pending investigation) and trespassing of two employees who refused to participate in interviews without a shop steward, Bellagio had the right to do so. Any contrary holding which would sustain the unfair labor practice in this case would strip employers of the right to remove employees from the workplace when they refuse to participate in investigations.

C. The Board's Determination That Bellagio Violated Section 8(a)(1) of the Act Because Wiedmeyer Asked Garner To Leave The Premises After Being Placed On SPI Should Be Vacated.

The Board's determination that Bellagio violated Section 8(a)(1) when Wiedmeyer instructed Garner to stop talking to his coworker and leave the premises because he had been placed on SPI should also be vacated.

The Board contends that Bellagio violated the Act because he supposedly instructed Garner that he could not discuss discipline in the workplace. Answering Brief at 36-41. The Board's arguments in this regard distort the record, however. To the extent that Wiedmeyer may have told Garner to stop talking, the Board cannot take a single sentence out of context and in isolation and conclude that Bellagio somehow promulgated a directive which prohibited workplace discussion of discipline. A reasonable person would not conclude that the statement "coerce[d] or interfere[d] with those rights." *Tasty Baking Co.*, 254 F.3d at 124-25. Wiedmeyer was not issuing an oral directive to Garner that he could not speak about discipline at work and Garner unequivocally admitted that he did not believe that Wiedmeyer had issued such an instruction. Appendix00114-00115 ("Q: Since that time have you discussed discipline at work? A: Yeah. Q: A lot? A: Oh Yeah. Q: Did you ever feel like you couldn't talk about it at work? A: No. Q: Who have you talked to about it with? A: At one time or another, pretty much everyone in the department.").

Rather, Wiedmeyer was instructing Garner to leave, and the Board has long held that employers are entitled to place employees who refuse to participate in investigatory interviews on suspension and remove them from the workplace. Indeed, in *Roadway Express*, 246 NLRB at 1130, the Board found no violation when an employer placed two employees on disciplinary suspension because they

refused to cooperate when the employer requested that they make themselves available for an interview. In this case, Wiedmeyer did not place Garner on disciplinary suspension. Here merely sought to enforce a legitimate and lawful SPI. There is nothing inherently coercive about taking such action. If the Court vacates the Board's findings with respect to Garner's suspension pending investigation, it should vacate this finding as well because the alleged coerciveness of Wiedmeyer's statement is based on the supposed unlawfulness of the SPI.

The Board also denies that its reliance on a new theory to sustain the violation was inappropriate and describes Bellagio's argument to the contrary as an "attempt to circumvent well-settled precedent." Answering Brief at 39. The Board contends Bellagio's argument is meritless. It is wrong. Due process requires that Bellagio has "meaningful notice of a charge and a full and fair opportunity to litigate it." *Lamar Central Outdoor,* 343 NLRB 261, 265 (2004); *see also Sierra Bullets*, NLRB 242, 243 (2003) (citing *Paul Mueller, Co*., 332 NLRB 1350 (2000)). The two part test set forth in *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), has not been satisfied.

An allegation that Wiedmeyer made an unlawful statement is much different from an allegation that Wiedmeyer promulgated an overly broad rule. As the Board recently explained in *Flamingo Las Vegas Operating Co., LLC*, 359 NLRB No. 98, at 5-7 (Apr. 25, 2013), a supervisor's comments to a single employee "could not

reasonably be interpreted as establishing that he intended to implement a new, more restrictive solicitation policy regarding employees in the hospital." *Id.* Therefore, once Garner conceded that the statement was made only to him and not a rule of general applicability, there was no reason to question him or any of the other witnesses about the statement. In other words, by virtue of the Board's limited pleading, Bellagio limited its case and questioning. *See Lamar Central Outdoor*, 343 NLRB at 265. The Board may believe that the matter was fully litigated because it believes it can make factual findings, but that is not the test. The allegation can be deemed fully litigated if Bellagio had notice of the allegation and the ability to put on a defense.

The Board's contention that Bellagio was not prejudiced also cannot be taken at face value. Bellagio purposefully limited its case and questioning in light of the Board's allegations. It was precluded from "develop[ing] evidence on [the] issue." *Id.*

D. The Board's Determination That Bellagio Violated Section 8(a)(1) of the Act Because Wiedmeyer Observed Garner Speaking To A Coworker In The Bell Department Dispatch Room Should Be Vacated.

The Board's holding that Bellagio engaged in unlawful surveillance when Wiedmeyer encountered Garner in the Bell Department dispatch room should also be vacated. It is not supported by substantial evidence nor is it consistent with established law.

There is no dispute that Wiedmeyer saw Garner speaking to another employee in the dispatch room and then walked to the door to ensure that Garner was headed off property. As noted above, the dispatch room is a work area. It is one of the busiest work areas in the Bell Department. Wiedmeyer and other supervisors go there continuously throughout the day. It is well-established that when employees elect to conduct their organizational activity openly on company property, "observation of such activities by an employer is not unlawful." *Sunshine Piping, Inc.*, 350 NLRB 1186, 1193-1194 (2007); *Nu-Line Industries, Inc.*, 302 NLRB 1, 2-3 (1991) ("an employer's mere observation of open, public, union activity on or near its property does not constitute unlawful surveillance."); *Southwire Co.*, 277 NLRB 377, 378 (1985); *Oates Bros. Fruit & Produce*, 191 NLRB 736 (1971); *Aladdin Gaming, LLC*, 345 NLRB at 585-586.

The Board's response is dedicated to its contention that an employer may still unlawfully surveil an employee when it does something out of the ordinary. Answering Brief at 42-43. That is an accurate statement of the law, but the manner in which the Board has pursued the matter conflates surveillance with other allegedly coercive behavior which might violate Section 8(a)(1) of the Act. The idea behind finding "surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of

who is involved in union activities, and in what particular ways." *Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000) (citing *Flexsteel Industries*, 311 NLRB 257 (1993)).

The allegations on which the Board relies in its Decision and in the Answering Brief have *nothing* to do with observation, or even unusual observation. Appendix00002, Appendix00012, and Answering Brief at 42-43. They concern the allegedly unlawful SPI and Wiedmeyer's allegedly coercive statement.[6] *Id.* The cases cited by the Board such as *Partylite Worldwide, Inc.*, 344 NLRB 1342 (2005) and *Liberty House Nursing Homes*, 245 NLRB 1194 (1979) confirm that this is a situation where the Board has attempted to draw from its theory of liability to characterize the facts, rather than litigate a proper theory based on the actual testimony.

The Board's editorializing of the facts aside, there is no proof that Wiedmeyer did anything out of the ordinary with respect to his observation of

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[6] The Board quotes a sentence from the Board decision in which the Board asserts that Wiedmeyer "aggressively observed Garner's SPI discourse under the auspices of an invalid SPI, banning such discussion, ousting him from the workplace and hovering as he left." Appendix00012, Answering Brief at 43. The testimony does not support this description. At page 122, Garner says that he was in the dispatch room discussing his SPI when Wiedmeyer came around the corner and told him to leave. There is no mention of aggression or hovering or that Wiedmeyer followed Garner into the dispatch area. The assertion that Wiedmeyer followed Garner is based on a "hopelessly incredible, self-contradictory" leading question asked by the Board's counsel. Appendix00112; *Cadbury Beverages*, 160 F.3d at 28.

Garner. Wiedmeyer encountered Garner in a high-traffic public work area and instructed him to leave. Under established Board law, even if the Court were inclined to sustain the other alleged violations of the Act, this allegation should be vacated and dismissed. Finding that an employer can engage in surveillance because, in the context of allegedly committing other unfair labor practices, an employee is within the manager's line of site, is an extraordinary departure from precedent and misapprehends a conclusion that Wiedmeyer supposedly engaged in coercive conduct with a finding that the same facts must also establish an 8(a)(1) surveillance violation. It should be vacated.

E. The Board's Recommended Order and Notice Cannot Be Enforced. They Are Unlawful And Violate Section 10(e) Of The Act Because They Are Not Sufficiently Tailored To The Circumstances Of This Case.

The Board contends that due to its broad discretion, it has the authority to order Bellagio to take affirmative actions which have no relationship to the violations at issue in the case. For example, the Board contends that it is proper to order Bellagio to notify employees that they are entitled to their chosen *Weingarten* representative regardless of context because it is related to the *Weingarten* violation found in the case and because it restates the law. Both assertions are inaccurate. Bellagio did not deny Garner access to a *Weingarten* representative of his choosing, and under *Anheuser-Busch, Inc.*, 337 NLRB 3, 7-12

(2001), the right to choose a representative is not unfettered. As such, it is not clear why such a statement is necessary to remedy an alleged violation of the Act.

The Board's response to Bellagio's second criticism of the Order, that Section 1d is overly broad because it does not provide for exceptions in appropriate circumstances, such as preventing a coverup or protecting witnesses from retaliation, is limited to a claim that the Board is entitled to use clear language and that the use of exceptions would dilute the effectiveness of the order. However, both confusion and an ineffective remedy can be the result of a poorly drafted, overly broad order that results in employee misapprehension of the Act. The Board's proposed remedial order and notice cannot be enforced because it is contrary to Board precedent and violates Section 10(c) of the Act. *See NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142-1143 (7th Cir. 1992); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984) (orders must be "sufficiently tailored to expunge only the actual, and not merely speculative, consequences" of the identified unfair labor practice).

CONCLUSION

For the reasons set forth above, the Bellagio's Petition to Vacate the Board's August 20, 2015 Decision and Order should be granted.

May 24, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32-1, I certify that this Petitioner's Final Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Petitioner's Final Reply Brief contains 6,465 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Petitioner's Final Reply Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Petitioner's Final Reply Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 24th day of May, 2016.

JACKSON LEWIS P.C.

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CERTIFICATE OF SERVICE

In addition to filing this **Petitioner's Final Reply Brief** in the above captioned matter via the Court's electronic filing system, we hereby certify that copies have been served this 24th day of May, 2016, by First Class Mail, upon:

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